Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1978

NO. 77-1743

DOWNTOWN L.A. IMPORTS, DOWNTOWN L.A. MOTORS, VOLKSWAGEN OF DOWNTOWN L.A., PORSCHE/AUDI OF DOWNTOWN L.A., GIANT FELIX CHEVROLET,

Appellants,

vs.

EVELLE J. YOUNGER, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,

Appellee.

REPLY TO MOTION TO DISMISS OR AFFIRM

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1978

NO. 77-1473

DOWNTOWN L.A. MOTORS, DOWNTOWN L.A. MOTORS, VOLKSWAGEN OF DOWNTOWN L.A., PORSCHE/AUDI OF DOWNTOWN L.A., GIANT FELIX CHEVROLET,

Appellants,

vs.

EVELLE J. YOUNGER, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,

Appellee.

REPLY TO MOTION
TO DISMISS OR AFFIRM

The First And Fourteenth Amendments Must Be Deemed To Require Some Showing On The Part Of A State Investigatory Agency Before It Can Compel Production Of Documents As Part Of An Investigation That Touches Upon The Exercise Of Rights Of Commercial Speech.

Appellee's Motion to Dismiss or Affirm characterizes the issue on this appeal as merely involving the acknowleged power of an investigatory agency to compel production of books and records as

part of its legitimate investigatory duties. Appellee's statement of the issue fails to come to grips with appellants' contention on this appeal. Briefly restated, appellants submit for review by this Court the question of whether the recent incorporation of Commercial Speech within the First Amendment does not bear implication as to the scope of the government's investigatory powers. Appellants argue that the rationale of this Court's work in the area of the First Amendment compels by logical implication the conclusion that the power of government to investigate Commercial Speech must be constitutionally limited to some extent. Appellants contend that this limitation must include, at the least, the requirement of some showing on the part of the investigatory agency of a reason to believe that the party investigated may have violated some applicable law or regulation relating to advertising.

Appellee cites in support of his Motion to Dismiss or Affirm the decision of United States v. Morton Salt Co., 338 U.S. 623 (1949). That case involved the issue of the power of an administrative agency to compel production of records as part of its investigative functions, with nothing more. No First Amendment issues were present in the Morton Salt case.

Appellants acknowledge the general rule set forth in Morton Salt, but submit that the inquiry cannot end there. For,

> "[T]he power to investigate is only an adjunct of the power to legislate - an auxillary power 'necessary and appropriate to that end.' . . . When

> the constitutional limits of law making are passed, investigation is out of bound, ... For it misses the whole point of our constitutional history to assume that 'government,' or any other branch of government, somehow has rights and powers of its own apart from those necessarily attending the proper performance of its constitutional functions." [citations omitted]
>
> Gibson v. Florida Legislative Investigation Com., 372 U.S. 539, 561-62 (1963) (Douglas, J. concurring).

Acting on this principal, this Court, and lower federal courts, have repeatedly held that the power of investigation, whether exercised by the Congress, the executive, or even by the Grand Jury, must be placed under constitutional limitation where the object of the investigation are matters protected by the First Amendment. DeGregory v. Attorney General, 383 U.S. 835 (1966); Gibson v. Florida Legislative Investigation Co., supra.; Sweezy v. New Hampshire, 354 U.S. 234 (1957); United States v. Rumely, 344 U.S. 41 (1953); Bursey v. United States, 466 F.2d 1059 (9th Cir. 1972).

These cases recognize the practical concern that the power to investigate, if unchecked, may amount to the power to suppress. See, e.g., United States v. Rumely, supra., 344 U.S. at 58. This Court has now established that advertising, Commercial Speech, cannot directly be suppressed by the State. The question presented by this appeal is whether the State may be deemed to have an indirect

power to suppress Commercial Speech in the form of an unchecked and unbridled power to investigate.

In the context of highly sensitive First Amendment areas, such as membership lists in associations, newspaper reporting or political leafleting, this Court has imposed a "heavy burden" on the government to establish that its interest in the subject of the investigation is "immediate, substantial and subordinating," that there is a "substantial connection" between the information it seeks and the overriding governmental interest in the subject matter, and that the means of obtaining the information is no more drastic than is necessary to forward the asserted governmental interest. Gibson v. Florida Legislative Investigation Com., supra., 372 U.S. at 551, 557; accord, Bursey v. United States, supra., 466 F.2d at 1083.

Appellants do not contend that the same burden must be placed on the investigating agency where the object of investigation is Commercial Speech. Recognizing the "commonsense differences" between Commercial Speech and other more sensitive First Amendment areas, Va. St. Bd. of Pharm. v. Va. Cit. Const. Council, 425 U.S. 748, 771, n. 24 (1976), appellants argue that a less stringent showing may be all that is constitutionally mandated. But, appellants strongly urge that it would be inconsistent with this Court's work in the host of cases now recognizing the protected status of Commercial Speech to permit investigations that such as that at issue merely upon the whim or caprice of the investigating agency. Such a rule opens the investigation to abuse and potentially to the suppression of

First Amendment rights. Such "unbridled discretion" should not be allowed to devolve "upon executive and administrative officers. . ." See Marshall v. Barlow's, Inc., ___ U.S. ___, 98 S.Ct. 1816, 1825-26 (1978).

Appellees rely on this Court's statement that "false" advertising as such is not subject to First Amendment protection. See Bates v. State Bar of Arizona, 433 U.S. 350, 383 (1977). Yet this is not a reason for permitting all investigation of advertising without regard to constitutional limitation. Appellee might as well argue that because obscenity is not protected by the First Amendment, the State's investigation of book publishing activities is not subject to constitutional restraint. Such an argument is invalid because it assumes the question at issue: whether or not the particular activity in question, be it book publishing or advertising, is in fact such as to fall outside the realm of constitutional protection. See Marcus v. Search Warrant, 367 U.S. 717, 719 (1961).

Fortunately, lower federal courts have not accepted appellee's facile reasoning. As noted in appellants' jurisdictional statment, a growing number of lower federal court decisions recognizes that although the First Amendment does not prohibit the State from controlling false or deceptive advertising the First Amendment nonetheless imposes limits on the State's regulatory powers. See Beneficial Corp. v. F. T. C., 542 F.2d 611 (3rd Cir. 1976), Cert. Den. ___ U.S. ___ (1977); F. T. C. v. Simeon Management Corp., 532 F.2d 708 (9th Cir. 1976); Anderson, Clayton & Co. v. Washington St. Dept. of Agric., 402 F.Supp. 1253 (W.D.Wash. 1975).

Appellants contend that the competing interests of the State to control deceptive or false advertising and of the public to an open and continuing flow of information through advertising can only be accommodated by limiting the State's power of investigation to those cases where there is some reasonable grounds in fact to believe that the advertising may be false or deceptive. Such a showing would not place an impossible burden on the State, but instead would militate against unnecessary investigations that tend only to suppress and chill the exercise of First Amendment rights. See Watkins v. United States, 354 U.S. 1978, 208-09 (1957). This Court should undertake to resolve the substantial and important issues presented on this Appeal.

Dated: July 14, 1978.

Respectfully submitted,

HARRISON W. HERTZBERG
Attorney for Appellants

HERTZBERG, KAPLAN & KOSLOW
Of Counsel

(PROOF OF SERVICE BY MAIL - 1013, 1013a C.C.P. (2), 2015.5 C.C.P.)

STATE OF CALIFORNIA)
) SS.
COUNTY OF LOS ANGELES)

AFFIDAVIT OF SERVICE BY MAIL
BY ATTORNEY

I, HARRISON W. HERTZBERG, being first duly sworn, say that I am and was at all times herein mentioned a citizen of the United States, and over the age of 18 years; I further say that I am an active member of the State Bar of California and of this Court, counsel in this cause, and not a party thereto.

My business address is 3550 Wilshire Boulevard, Suite 1418, Los Angeles, California 90010.

That on July 14, 1978, I served the within REPLY TO MOTION TO DISMISS OR AFFIRM on the interested parties in said action by placing three copies thereof in a sealed envelope with postage thereon fully prepaid, in the United States mail at 3550 Wilshire Boulevard, Los Angeles, California 90010 addressed as follows:

Attorney General Evelle J. Younger, Michael R. Botwin, Deputy Attorney General, 3580 Wilshire Boulevard, Los Angeles, CA 90010;

Court of Appeal, Second Appellate District, 3580 Wilshire Boulevard, Room 301, Los Angeles, CA 90010;

California State Supreme Court,
3580 Wilshire Boulevard, Los
Angeles, CA 90010;

HARRISON W. HERTZBERG

Subscribed and sworn to
before me this 14th da
of July, 1978.

OFFICIAL SEAL
MINA QUEZADA
NOTARY PUBLIC - CALIFORNIA
LOS ANGELES COUNTY
My comm. expires OCT 27, 1981

Notary Public in and for
said County and State.